EXHIBIT 1
DATE 1/29/2013
SB 53

**SB53 ANSWERS TO OBJECTIONS RAISED**

- Disobedience of any lawful judgment, order, or process of the court may be punished as contempt of court. *M.C.A. 3-1-501.* 3-1-501(3) says:

> (3) A contempt may be either civil or criminal. A contempt is civil if the sanction imposed seeks to force the contemnor's compliance with a court order. A contempt is criminal if the court's purpose in imposing the penalty is to punish the contemnor for a specific act and to vindicate the authority of the court. If the penalty imposed is incarceration, a fine, or both, the contempt is civil if the contemnor can end the incarceration or avoid the fine by complying with a court order and is criminal if the contemnor cannot end the incarceration or avoid the fine by complying with a court order. If the court's purpose in imposing the sanction is to attempt to compel the contemnor's performance of an act, the court shall impose the sanction under 3-1-520 [fine not to exceed $500 and/or incarceration until performance of the act] and may not impose a sanction under 45-7-309 [fine not to exceed $500 and/or incarceration not to exceed 6 months].

Nothing in 3-1-501(3) requires the court to have previously imposed, deferred or suspended a jail sentence. Thus, *a person who is not given some form of a jail sentence (imposed, deferred or suspended), and who fails without good cause to pay a fine or other costs imposed by the court upon sentencing, may be brought into court and may be jailed for the default.* A PD may be needed at that stage because of the possibility of incarceration then, but not at the initial stage where incarceration was not possible.

- All courts must impose a surcharge in addition to other taxable costs, fees, or fines on any person convicted for any conduct made criminal by state statute or upon forfeiture of bond or bail. *M.C.A. 46-18-236(1).* Subsection (2) of 46-18-236 says:

> (2) If a convicting court determines under 46-18-231 and 46-18-232 that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time,* the court shall waive payment of the charge imposed by this section.

Nothing in 46-18-236(2) requires the court to have previously imposed, deferred or suspended a jail sentence. Thus, *surcharges are not waived if some form of a jail sentence was not possible or a jail sentence was not given,* only if the person cannot pay fines or costs within a reasonable time.

*A court may require a person convicted of a felony or misdemeanor to pay a fine and costs. The court may not do so if the person is unable to pay the fine and/or costs. *M.C.A. 46-18-231(3)* and *232(2).* Payment of a fine or costs can be made a condition of a deferred or suspended sentence but a suspended or deferred sentence may not be revoked if the defendant defaults on the payments and the default is not attributable to an intentional refusal to obey the order of the court or a failure to make a good faith effort to make the payment. *M.C.A. 46-18-233.* Nothing was found that says surcharges must be waived if the possibility of incarceration was not available at sentencing.

At least some of the judges of courts of limited jurisdiction utilize a computer-based program, which flags cases when someone has not made payments on fines or costs ordered by the court. This "overdue processing" program can print out a notice to the person in default requiring an appearance in court to explain the reason for not paying. This program can also send a notice to the DMV for suspension of the person's driver's license.

- The criminal statutes changed by SB53 **will not** be rendered unconstitutional nor will a court be prohibited from imposing a jail sentence on second and subsequent offenses. "The right to counsel in misdemeanor cases extends only to those cases in which a sentence of imprisonment is actually imposed." *State v. Nixon*, 2012 MT 316, ¶17, ___ Mont. ___, ___ P.3d ___, citing *State v. Hass*, 2011 MT 296, ¶20, 363 Mont. 8, 265 P.3d 1221. Further, a person is not entitled to the appointment of a public defender in a criminal case if incarceration is not a sentencing option. *M.C.A. 46-8-101* and *47-1-104(4)(a)(i).* Consistent with the Sixth and Fourteenth Amendments, an "uncounseled" misdemeanor conviction, valid due to the absence of the imposition of a jail term, is also valid when used to enhance the punishment at a subsequent conviction. *Nichols v. United States*, 511 U.S. 738, 746-49, 114 S.Ct. 1921, 1927-28 (1994); *State v. Spotted Eagle*, 2003 MT 172, ¶34, 316 Mont. 370, 71 P.3d 1239. While it is well established in Montana that the State may not use a constitutionally infirm conviction to support an enhanced punishment, there is a rebuttable presumption of regularity with the prior conviction that the defendant has the burden of overcoming by producing affirmative evidence and persuading the court, by a preponderance of the evidence, that the prior conviction is constitutionally infirm. *Nixon*, ¶¶15-16; *Hass*, ¶¶14-15.

**(Over)**

- The criminal statutes changed by SB53 **will not** prevent arrests because the offense will have become a non-jailable offense. In *State v. Bauer*, 2001 MT 248, ¶33, 307 Mont. 105, 36 P.3d 892, the Montana Supreme Court considered an arrest made for the non-jailable offense of unlawful possession of alcohol by a minor (MIP), second offense, and after finding no special circumstances justifying an immediate arrest such as a concern for the safety of the offender or the public or existing circumstances requiring an immediate arrest allowed under *M.C.A. §46-6-311(1)*, held:

> We hold that under Article II, Section 10 and Section 11, of the Montana Constitution, it is unreasonable for a police officer to effect an arrest and detention for a non-jailable offense when there are no circumstances to justify an immediate arrest. In the absence of special circumstances such as a concern for the safety of the offender or the public, a person stopped for a non-jailable offense such as second offense, MIP, or a seatbelt infraction should not be subjected to the indignity of an arrest and police station detention when a simple, non-intrusive notice to appear pursuant to §46–6–310(1), MCA, will serve the interests of law enforcement.

Citing *Bauer*, and reminding that an officer's exercise of discretion to arrest must be reasonable [¶30], held that the circumstances of truancy and the smell of alcohol on a 14 year old boy justified an immediate arrest. *In the Matter of Z.M., a Youth*, 2007 MT 122, ¶35-36, 337 Mont. 278, 160 P.3d 490. Citing *Bauer* and *In the Matter of Z.M.*, the Supreme Court held that the circumstances of a report of a near accident and the appearance of intoxication justified a warrantless DUI arrest of a man standing in the doorway of his mobile home in *Muller v. State, Department of Justice*, 2012 MT 66, ¶¶14-16, 364 Mont. 328, 274 P.3d 737.